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Number 91 - 40

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NICHOLAS E. BRUSCO,

Petitioner ,

vs.

STATE OF NEW YORK
DIVISION OF HOUSING & COMMUNITY RENEWAL,

Respondent .

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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CASES

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Donovan v. Cunard S.S. Co., 236 N.Y. 651, 142 N.E. 320 (1923), *reh'g denied*, 237 N.Y. 524, 143 N.E. 728 (1923), *cert. denied*, 264 U.S. 582, 68 L.Ed. 860 (1923).

Fisher v. Perkins, 122 U.S. 522, 30 L.Ed. 1192, 7 S. Ct. 1227 (1887).

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Glenn Mohawk Milk Assoc., Inc. v. Wickham, 28 A.D.2d 764, 280 N.Y.S.2d 839 (3d Dept. 1967), *app. dism'd* , 21 N.Y.2d 719, 287 N.Y.S.2d 683, 234 N.E.2d 705 (1967), aff'd, 24 N.Y.2d 963, 302 N.Y.S.2d 593 (1969), *remittitur amended*, 25 N.Y.2d 887, 304 N.Y.S.2d 4 (1969), *cert. denied*, 396 U.S. 1004, 24 L.Ed.2d 496 (1970).

Gotthilf v. Sills, 375 U.S. 79, 11 L.Ed2d 159, 84 S. Ct. 187 (1963).

Hetrick v. Lindsay, 265 U.S. 384, 68 L.Ed. 1065, 44 S. Ct. 486 (1924).

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 60 L.Ed.2d 336, 99 S. Ct. 1813 (1979).

Johnson v. Whaley, 239 N.Y. 570, 147 N.E. 200 (1924).

Keystone Bituminous Coal Assoc. v. De Benedictus, 480 U.S. 470, 94 L.Ed.2d 472, 107 S. Ct. 1232 (1987).

Matter of Pulp Sales Corp. v. Orange Pulp & Paper Mills, 288 N.Y. 505, 41 N.E.2d 924 (1942).

Matthews v. Huwe, 269 U.S. 262, 70 L.Ed. 266, 46 S. Ct. 108 (1925).

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Norfolk & S. Turnpike Co. v. Virginia, 225 U.S. 264, 56 L.Ed. 1082, 32 S. Ct. 828 (1912).

Penn Central Transportation Co. v. New York City Landmarks Preservation, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978), *reh'g denied*, 439 U.S. 883, 58 L.Ed.2d 198. 99 S.Ct. 226 (1978).

People v. Trimarchi, 231 N.Y. 263, 131 N.E. 910 (1921).

Pillsbury Flour Mills Co. v. Nicotera, 234 N.Y. 534, 138 N.E. 436 (1922).

Re Schmidt, 236 N.Y. 645, 142 N.E. 318 (1923).

R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 93 L.Ed.2d 449, 107 S. Ct. 499 (1986).

Stratton v. Stratton, 239 U.S. 55, 60 L.Ed. 142, 36 S. Ct. 26 (1915).

Western Union Telegraph Co. v. Crovo, 220 U.S. 364, 55 L.Ed. 498, 31 S. Ct. 399 (1911).

OTHER AUTHORITIES:

Cohen & Karger, *The Powers of the New York Court of Appeals*, (1952).

Newman, Thomas R., *New York Appellate Practice* (1991).

Stegman, Michael A., *New York City Housing & Vacancy Report, 1987.*

IN THE
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NICHOLAS E. BRUSCO,

Petitioner,

vs.

STATE OF NEW YORK
DIVISION OF HOUSING & COMMUNITY RENEWAL,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ADDITIONAL STATUTORY PROVISIONS AND RULES INVOLVED[1]

1. 28 U.S.C. § 1257(a).

2. N.Y. Civ. P. & Rules, 5601 and 5602

[1] These additional statutory provisions and rules appear in Appendix H hereto.

JURISDICTION

The judgment of the New York Court of Appeals dated April 4, 1991, dismissing petitioner's appeal for lack of substantial constitutional question is a final judgment of New York's highest court within the meaning of 28 U.S.C. § 1257(a). Thus, petitioner's writ for certiorari is properly before this Court.

The New York Court of Appeals is the highest court of the State of New York. Pursuant to New York Law, appeals from the Appellate Division to the New York Court of Appeals may be made as of right[2] or upon leave.[3] Petitioner took his appeal as of right, pursuant to CPLR 5601(b)(1), arguing only the constitutional question. The Court of Appeals dismissed the appeal, sua sponte, for lack of substantial constitutional question.[4]

Respondent argues, in sum, that because petitioner did not make both an appeal as of right and a discretionary appeal, he did not exhaust his remedies and the New York Court of Appeals judgment is not final within the meaning of 28 U.S.C. § 1257(a). The cases of this Court, including those cited by respondent, hold otherwise.

Further, contrary to respondent's view and pursuant to New York law, it is not clear that a discretionary appeal lies concurrently with an as of right appeal. CPLR 5602(a)(1)(i) allows an appellant to seek discretionary review by the court of appeals "from an order of the appellate division which finally determines the action and which is not appealable as of right. ..." (emphasis added). Therefore, it follows that where an appeal does lie as of right, there is no provision for a discretionary appeal. Glenn Mohawk Milk Assoc., Inc. v. Wickham,[5] is not

[2] New York Civ. P. Law & Rules 5601.

[3] New York Civ. P. Law & Rules 5602.

[4] The opinion of the New York Court of Appeals is appended hereto as Appendix I.

contradictory. In Glenn Mohawk, appellant took both an appeal as of right on constitutional grounds, and a discretionary appeal, on constitutional and other grounds, to the New York Court of Appeals. The court of appeals dismissed the as of right appeal because "no substantial question directly involving the construction of the Constitution of this State or of the United States was raised in the courts below and, therefore, no appeal lies as of right." [6] The case was dismissed not on the merits, but because the appellant had no appeal as of right.

The other cases cited by respondent do not support its contention that a New York litigant must file both a discretionary and an appeal as of right on a constitutional question to achieve finality within the meaning of 28 U.S.C. § 1257(a).

In Fisher v. Perkins,[7] the petitioner sought a writ of certiorari to the judgment of the Superior Court of the State of Kentucky. This Court denied jurisdiction because the Superior Court was not Kentucky's highest court and the petitioner had not made any application to the high court. In this regard the Court stated:

> This court has no power to review any other judgments of the courts of a State than those of the highest court "in which a decision in the suit could be had." Sec. 709, Rev. Stat. The court of appeals is the highest court of the State of Kentucky, and consequently, until it has been made to appear affirmatively on the face of the record

[5] 28 A.D.2d 764, 280 N.Y.S.2d 839 (3d Dept. 1967), *app. dism'd,* 21 N.Y.2d 719, 287 N.Y.S.2d 682 (1967), *aff'd,* 24 N.Y.2d 963, 302 N.Y.S.2d 593 (1969), *remittitur amended,* 25 N.Y.2d 887, 304 N.Y.S.2d 4 (1969), *cert. denied,* 396 U.S. 1004, 24 L.Ed.2d 496 (1970).

[6] Glen Mohawk, 21 N.Y.2d 719 at 720.

[7] Fisher, 122 U.S. 522, 30 L.Ed. 1192 (1887)

> that a decision in this could not have been had in that court, we are not authorized to review the judgment of the Superior Court.[8]

In Mullen v. Western Beef Co.,[9] the petitioner sought a writ of certiorari to Colorado's Court of Appeals, an intermediate appellate court. Pursuant to Colorado law, appeals on constitutional questions were as of right to the supreme court, Colorado's highest court. The petitioner did not appeal its constitutional question to the Colorado Supreme Court, and this Court denied the petition for a writ of certiorari stating:

> And although the Supreme Court might have applied the rule that where a judgment rests on grounds not involving a constitutional question it will not interfere, we cannot assume that that court would not have taken jurisdiction, since it has not so decided in this case, nor had any opportunity to do so.
>
> We must decline to hold that it affirmatively appears from the record that a decision could not have been had in the highest court of the State, and this being so, the writ of error cannot be sustained.[10]

Likewise, in Stratton v. Stratton,[11] the petitioner appealed to this Court from a judgment of an intermediate Ohio appellate court without having made application to Ohio's high court, the supreme court. This Court dismissed for want of

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[8] Fisher, 122 U.S. at 525, 30 L.Ed. at 1192-93.

[9] 173 U.S. 116, 42 L.Ed. 635 (1899).

[10] Mullen, 173 U.S. at 123, 43 L.Ed. at 637.

[11] 239 U.S. 55, 60 L.Ed. 142 (1915).

jurisdiction stating:

> True, it is urged that under Ohio law the jurisdiction of the supreme court was not imperative, but gracious or discretionary, that is, depending upon its judgment as to whether the case was one of public or great general interest, --an exceptional class in which the case before us, it is insisted, we must now decide was not embraced. But this simply invites us to assume jurisdiction by exercising an authority which we have not; that is, by indulging in conjecture as to what would or would not have been the judgment of the supreme court of Ohio if it had been called upon to exert the discretion vested in it by state laws.[12]

In the above cases, unlike the case at bar, the petitioner made no appeal whatsoever to the state high court before petitioning this Court for a writ of certiorari. Thus, the writs were denied because the orders appealed from were not final.

The case of McMaster v. Gould,[13] did not involve a constitutional issue, and pursuant to New York law, the appellant did not have any appeal as of right to New York's highest court. There is no question that an appeal to the New York Court of Appeals which is not a matter of right, taken without leave, must be dismissed.[14] Despite the appellate division's denial of the

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[12] Stratton, 239 U.S. at 56, 60 L.Ed. at 143.

[13] 276 U.S. 284, 72 L.Ed. 574 (1928).

[14] People v. Trimarchi, 231 N.Y. 263, 268, 131 N.E. 910 (1921); Pillsbury Flour Mills Co. v. Nicotera, 234 N.Y. 534, 138 N.E. 436 (1922); Re Schmidt, 236 N.Y. 645, 646, 142 N.E. 318 (1923); Donovan v. Cunard S.S. Co. 236 N.Y. 651, 142 N.E. 320, *reh'g denied,* 237 N.Y. 524, 143 N.E. 728 (1923); Johnson v. Whaley, 239 N.Y. 570, 571 147 N.E. 200

appellant's application for permission to appeal to the New York Court of Appeals, the appellant appealed directly to the New York Court of Appeals. The appellant did not make an application for leave, nor did he have an appeal as of right. The court of appeals dismissed the appeal without opinion.[15] This Court dismissed the writ for lack of jurisdiction stating:

> And since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the court of appeals for leave, the judgment is not that of the highest court of the state in which a decision could be had.[16]

Further, the petitioner in McMaster did not dispute that the decision of the appellate division appealed from did not finally and completely dispose of the entire action.

The case of Gotthilf v. Sills[17] does not support respondent's proposition. In Gotthilf, the New York Court of Appeals dismissed both the appellant's discretionary motion for leave to appeal and his motion for an as of right appeal on the sole ground that "the order sought to be appealed from [did] not finally determine the action within the meaning of the Constitution."[18] Thus, as a matter of New York State law, the court of appeals dismissed the appeal because under New York law[19] an appeal on such a non-final order is only allowed by leave of the appellate division. The dismissal by the Court of Appeals was not on the merits, but for lack of jurisdiction on the

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(1924).

[15] 242 N.Y. 604, 152 N.E. 446 (1926).

[16] McMaster, 276 U.S. at 286-87, 72 L.Ed. at 575.

[17] Gotthilf v. Sills, 375 U.S. 79, 11 L.Ed 2d 159 (1963).

[18] Gotthilf v. Sills, 12 N.Y.2d 761 (1962).

[19] Civil Practice Act, § 589.

ground that the order appealed from did not finally resolve the entire dispute between the parties, and therefore, the case was not properly before the court of appeals. This Court dismissed the writ for certiorari as improvidently granted, because the "judgment of the Appellate Division [was] not that of the 'highest court of a State in which a decision could be had' within the meaning of 28 USC § 1257."[20]

In Matthews v. Huwe,[21] the high court of the State of Ohio, the supreme court, dismissed the constitutional appeal because the issue was not properly raised below so as to preserve appellate review.[22] The appellant sought a writ of certiorari, not to the supreme court decision, but to the intermediate appellate court decision, the Ohio Court of Appeals. This Court denied the writ because it perceived the Ohio Supreme Court's decision as a dismissal on jurisdictional grounds, and not on the merits. Distinguishing Matthews from Hetrick v. Lindsey,[23] Western Union Telegraph Co. v. Crovo[24] and Norfolk & S. Turnp. Co. v. Virginia,[25] this Court denied the writ stating:

> We think, however, that in [Western Union and Norfolk] as in the Hetrick Case, on the face of the record the state supreme court did pass on the merits of the case by holding that the questions involving the Constitution of the United States, and being the only ground for a writ of error from this court, were not debatable. It is one of those not infrequent cases in which the decision on the merits of

[20] Gotthilf, 375 U.S. at 80, 11 L.Ed.2d at 161.

[21] 269 U.S. 262, 70 L.Ed. 266 (1925).

[22] Matthews, 269 U.S. at 263, 70 L.Ed. at 267.

[23] 265 U.S. 384, 68 L.Ed. 1065 (1924).

[24] 220 U.S. 364, 55 L.Ed. 498 (1911).

[25] 225 U.S. 264, 56 L.Ed. 1082 (1912).

> the case also determines jurisdiction. The petition was dismissed, not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the court could consider.[26]

In Hetrick, the Ohio high court had dismissed the appellant's appeal as of right because the statute under constitutional attack had been in effect for so long that the state court would no longer question its constitutional validity. This Court granted the writ of error because the dismissal was one on the merits.

In Norfolk and Western Union, the appellants sought writs of certiorari from the inferior Virginia State court because the high court summarily dismissed the appeals. In perceiving those dismissals as on the merits, rather than for jurisdictional reasons, this Court allowed the writs.

Thus, in Matthews, this Court denied the writ because petitioner had not properly preserved its constitutional claim in the state courts. The decision of the Ohio Supreme Court dismissing the appeal was not on the merits, but because the issue had not been preserved for appellate review. Under such circumstances, petitioner could not then obtain the writ of certiorari to a lower court decision as a final decision. That part of Matthews upon which respondent relies herein is dicta. Insofar as Matthews supports respondent's position it has been subsequently overruled in Minneapolis, S.P. & S.S.M.R. Co. v. Rock,[27] Chesapeake & O.R. Co. v. Mihas [28] and most recently in R.J.

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[26] Matthews, 269 U.S. at 265, 70 L.Ed. at 267-68.

[27] 279 U.S. 410, 73 L.Ed. 766 (1929)

[28] 280 U.S. 102, 74 L.Ed. 207 (1929).

Reynolds Tobacco Co. v. Durham County[29] In both Minneapolis and Chesapeake, this Court held that where there are two avenues to the high court of the state, for purposes of 28 U.S.C. § 1257(a), it is enough that a litigant pursue one in getting to that court.

R.J. Reynolds squarely supports this Court's jurisdiction herein. Under North Carolina State law, appeal to the highest court, the Supreme Court, could be had by discretion or insistence, on a constitutional question. Reynolds, the petitioner, had made a petition for discretionary review to the N.C. Supreme Court. Upon motion of Durham County, the court dismissed the appeal for lack of substantial constitutional question. Reynolds then appealed to this Court, wherein Durham objected to jurisdiction pursuant to 28 U.S.C. § 1257(a) because Reynolds had not also made a timely "insistent" appeal, or, appeal as of right. This Court found the argument unpersuasive, considered the N.C. Supreme Court's dismissal for lack of substantiality as one on the merits, and granted the writ for certiorari stating:

> [A] state statute is sustained within the meaning of sec. 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds.[30]

This Court held further that :

> [T]here [was] no question that the North Carolina Supreme Court had jurisdiction to hear Reynolds' appeal, but it determined not

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[29] 479 U.S. 130, 93 L.Ed.2d 449 (1986)

[30] R.J. Reynolds, 479 U.S. at 137, 93 L.Ed.2d at 460 (*citing*, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 60 L.Ed.2d 336, 99 S. Ct. 1813 (1979)).

> to do so in light of its conclusion that the appeal raised no substantial constitutional question.[31]

These are the facts of the case at bar. The constitutional question was put squarely before the New York Court of Appeals which dismissed for lack of substantial constitutional question. The Court of Appeals had jurisdiction to hear the appeal, but determined not to hear it. This is a decision on the merits by the highest court of the State of New York.

The test is whether the highest court of the state, in which a decision could be had, has passed on the merits of the question presented. If the case were not properly brought before the highest court of the state, then the question is not passed upon, rather the state court may dismiss the appeal for state law jurisdictional reasons, rendering a petition for review to this Court improper as the decision appealed from is non-final. Such was the case in Glenn Mohawk, McMaster, and Matthews. The test is not whether the decision appealed from is one of the highest court in the state because the applicable state law may not allow the appellant any appeal to the state's highest court. Thus, in Norfolk and Western Union, writs of certiorari to inferior state court decisions were granted. The test is whether the question was passed upon by the the highest state court in which a decision could have been had.

The New York Court of Appeals may dismiss a constitutional appeal as of right for lack of substantial constitutional question. This doctrine may be likened to that of stare decisis in that a constitutional appeal will be dismissed for lack of substantiality when the question has been previously decided,[32] or is "utterly lacking in merit."[33] It has been stated

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[31] R.J. Reynolds, 479 U.S. at 138, 93 L.Ed.2d at 461.

[32] Gerzof v. Gulotta, 40 N.Y.2d 825, 387 N.Y.S.2d 568, 355 N.E.2d 797 (1976); Matter of Pulp Sales Corp. v. Orange Pulp & Paper Mills, 288 N.Y.

that the substantiality of question requirement is designed to give the court a means of coping with cases where the mere ingenuity of counsel could be used in fashioning a constitutional question which is otherwise not appealable as of right.[34] Newman also states that :

> The [New York Court of Appeals'] power to find the constitutional question sought to be raised not substantial enables it to dismiss appeals taken as of right in those cases where it would have denied leave to appeal had the appellant sought permission.[35]

In the case at bar, petitioner has raised the Fifth Amendment Takings violation at the administrative level, to the trial court, the appellate division, and ultimately to the court of appeals as the only question presented. Petitioner's constitutional question was before New York's highest court, which necessarily passed on the question in finding that there was no substantial constitutional question. This is a decision on the merits by New York State's highest court. This petition for a writ of certiorari is properly before this Court.

505, 41 N.E.2d 924 (1942); Cohen & Karger, The Powers of the New York Court of Appeals, (1952) § 55, p. 254.

[33] Cohen & Karger, § 55, pp. 252-55.

[34] Newman, Thomas R., New York Appellate Practice (1991) § 11.01[2][iii].

[35] Id.

ADDITIONAL REASONS WHY THE WRIT SHOULD BE GRANTED

POINT I Respondent Employs An Incorrect Standard In Measuring Petitioner's Claim

This Court's standard for Fifth Amendment Taking of property is whether a regulation, which impairs an owner's property rights and would otherwise be violative of the Takings clause, substantially advances a legitimate state interest, or, denies an owner economically viable use of property.[36] Respondent has both miscited and misquoted[37] this Court's Takings test as set forth in Keystone,[38] Agins[39] and Penn Central[40] by stating that this Court requires both.

Furthermore, respondent tries to lower the constitutional standard by reducing it to the mere finding of rational basis where it is required to show substantial advancement.

POINT II Respondent Has Demonstrated No Connection Between the Challenged Provisions and Their Putative Purpose

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[36] Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-41, 97 L.Ed.2d 677, 687-92 (1987); Agins v. Tiburon, 447 U.S. 255, 260, 65 L.Ed.2d 106, 112 (1980); Penn Central Transportation Co. v. New York City Landmarks Preservation, 438 U.S. 104, 138, 57 L.Ed.2d 631, 657 (1978).

[37] Respondent's Brief in Opposition, p. 9.

[38] Keystone Bituminous Coal Assoc. v. De Benedictus, 480 U.S. 470, 485, 94 L.Ed.2d 472, 488 (1987)

[39] Agins, 447 U.S. at 260, 65 L.Ed.2d at 112.

[40] Penn Central, 438 U.S. at 127, 57 L.Ed.2d at 648.

Respondent has simply concluded that it is "obvious" that the challenged provisions fulfill a "plainly" legitimate state purpose.[41] This Court requires that in order to satisfy the constitutional test, respondent must show a close nexus between the burdens imposed on the property owner by the regulation and the alleviation of the problem it seeks to relieve.[42] Further, the obligations imposed on owners by the regulation may not be of the type that should be borne by the public as a whole.[43]

The record shows that the challenged provisions actually run counter to any legitimate state interest by providing incentive for owners to warehouse rent stabilized units, hindering the supply of newly constructed rental housing, fostering undermaintenance of existing rental housing and transferring the value of vacant below-market rent stabilized units to others. Respondent states that these are self-serving statements[44] and involve "complex phenomena which have not been tested in this litigation." The evidence in the record includes studies commissioned by the City of New York[45], and petitioner agrees that the evidence has not been tested in this litigation. This Court must resolve these issues in order to answer the constitutional question before it, and thus the writ should be granted.

New York's rent regulation grew out of wartime emergency. Respondent relies upon thirty years of rubber stamping by the New York State legislature and courts of rent regulation for the proposition that it is incomprehensible for this Court to find unconstitutional the challenged vacancy increase limitations. Petitioner's claim relates only to the vacancy increase

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[41] Respondent's Brief, p. 11.

[42] Nollan, 483 U.S. at 834-41, 97 L.Ed.2d at 687-92.

[43] Armstrong v. United States, 364 U.S. 40, 49, 4 L.Ed.2d 1554, 1561 (1960).

[44] Respondent's Brief, p. 11.

[45] New York City Housing & Vacancy Report, 1987, Stegman, Michael A.

portion of Rent Stabilization Law. It is not even clear from the legislative findings whether limitations on vacant apartments were contemplated as a part of the rent regulatory scheme, which was designed primarily to protect tenants in occupancy.

This Court need not find, nor does petitioner submit, that the rent control laws as a whole are unconstitutional. The Rent Stabilization Laws regulate tenants in occupancy as well as vacant apartments by guaranteeing renewal leases at prescribed rates. This part of the Rent Stabilization Law may advance the legitimate state interest of preventing the displacement of tenants in occupancy. The challenged provisions only apply to vacant apartments and, therefore, there is no tenant in occupancy to protect. This Court can clearly find that the challenged provisions are unconstitutional, without having to invalidate the rent control laws as a whole.

CONCLUSION

In sum, this petition is properly before this Court. The challenged provisions do not substantially advance any of their putative purposes as enumerated in the legislative findings. Respondent's overcharge order seeks to take petitioner's property without compensation in violation of the Fifth Amendment. Respondent has not shown how the challenged provisions advance any public purpose, whereas petitioner has shown that the challenged provisions do not substantially advance, and, in fact, run counter to, any legitimate state interest. If this Court determines that the challenged provisions are invalid, tenants in occupancy will not be affected. Petitioner has exhausted his state court remedies without the review mandated by this Court.

For these further reasons, the writ should be granted.

Dated: New York, New York
September 25, 1991

Respectfully submitted,

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APPENDIX H

28 U.S.C. § 1257(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised uner, the United States.

New York Civil Practice Law and Rules

Section 5601. Appeals to the court of appeals as of right.

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original

instances which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing , upon stipulation for a judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon nonfinal determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance, from a final determination of an administrative agency or from a final arbitration award, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment, determination or award and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

Section 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division, granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules

authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court, final determination of such agency or final arbitration award where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment, determination or award and the final judgment, determination or award is not appealable as of right pursuant to subdivision (d) of section 5601 of this article; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of

paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

APPENDIX I

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourth day of April A.D. 1991

Present, HON SOL WACHLER,
Chief Judge, presiding.

Mo. No. 378 SSD 27

In the Matter of Nicholas E. Brusco,

Appellant,

v.

New York State Division of
Housing & Community Renewal,

Respondent.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Judge Titone took no part.

Donald M. Sheraw
Clerk of the Court